



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Marc Elias, Esq.
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FEB 12 2018

RE: MUR 7166 (Hillary for America and
Jose H. Villarreal in his official
capacity as treasurer)

Dear Mr. Elias:

On November 2, 2016, the Federal Election Commission notified your client, Hillary for America and Jose H. Villarreal in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 6, 2018, the Commission found, on the basis of the information in the complaint and the response submitted by your client, that there is no reason to believe that your client violated 52 U.S.C. §§ 30104(b) and 30116(f) by accepting and failing to report excessive in-kind contributions. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003), and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

If you have any questions, please contact Shanna M. Reulbach, the attorney assigned to this matter, at (202) 694-1638.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Y. Tran".

Lynn Y. Tran
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Tom Nelson MUR: 7166
Nelson for Wisconsin and Dr. Beth Gillis in
her official capacity as treasurer
Hillary for America and Jose H. Villarreal in
his official capacity as treasurer

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the "Commission") by the Republican Party of Brown County. The Complaint alleges that congressional candidate Tom Nelson and his principal campaign committee, Nelson for Wisconsin and Dr. Beth Gillis in her official capacity as treasurer (the "Nelson Committee"), violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to report independent expenditures for a 31-second television advertisement that expressly advocated then-presidential candidate Donald Trump's defeat, and by failing to include a proper disclaimer on the advertisement. The Complaint also alleges that Nelson and the Nelson Committee coordinated the advertisement with the authorized committee of Trump's opponent Hillary Clinton, Hillary for America and Jose H. Villarreal in his official capacity as treasurer (the "Clinton Committee"), resulting in Nelson and the Nelson Committee making, and the Clinton Committee accepting, excessive and unreported in-kind contributions.

Based on the available information, described in detail below, the Commission dismisses the allegations that Nelson and the Nelson Committee violated 52 U.S.C. § 30104(b) and (g) by failing to properly report independent expenditures for the advertisement, and 52 U.S.C. § 30120 by failing to include a proper disclaimer on the advertisement. The Commission also finds no reason to believe that Nelson and the Nelson Committee violated 52 U.S.C. §§ 30104(b) and

30116(f) by making and failing to report excessive in-kind contributions through the advertisement, and no reason to believe that the Clinton Committee violated 52 U.S.C. §§ 30104(b) and 30116(f) by accepting and failing to report excessive in-kind contributions through the advertisement.

II. FACTUAL BACKGROUND

Tom Nelson was a federal candidate in Wisconsin's 8th Congressional District during the 2016 election cycle.¹ On October 21, 2016 — within 20 days of the November 8, 2016, general election — the Nelson Committee produced and began airing in the Green Bay market a 31-second television advertisement entitled "Real."² The advertisement features footage of Nelson speaking directly to the viewer as follows:

| Audio | Seconds |
|--|--------------------|
| I'm Tom Nelson, and there are some real differences between Mike Gallagher and me. | 0-5 |
| I believe big corporations and the wealthy should pay their fair share. Mike wants to give them more tax breaks. | 6-11 |
| I want to raise the minimum wage. Mike's against that. | 12-15 |
| I want to strengthen Social Security. Mike Gallagher wants to reduce benefits to the poverty line. | 16-21 |
| And one more thing. Mike Gallagher supports Donald Trump. | 22-25 |
| I approve this message because Donald Trump is dangerous and we can't let him become president. | 26-31 ³ |

In the final seconds of the advertisement, a "Nelson U.S. Congress" logo appears on the screen with a disclaimer that states, "Paid for by Nelson for Wisconsin. Approved by Tom Nelson."⁴

¹ Nelson lost the 2016 general election.

² Compl. at 2-3 (Oct. 28, 2016); Nelson & Nelson Comm. Resp. at 1 (Dec. 22, 2016).

³ Nelson for Wisconsin, "Real," YOUTUBE, <https://www.youtube.com/watch?v=kUy8WresrPw> (posted Oct. 21, 2016) ("Real").

⁴ *Id.*

1 The costs of the advertisement are unclear from the available information. The Nelson
2 Committee disclosed in its 2016 Post-General Report two disbursements totaling \$144,124 on
3 October 21, 2016, for “media.”⁵ It is unclear whether these disbursements include any or all of
4 the costs of the “Real” advertisement, but the payments were reported as being made on the same
5 date that the Committee produced the advertisement and began airing it.

6 The Complaint alleges that the advertisement was an independent expenditure because it
7 expressly advocated Trump’s defeat, and Trump was running for president, not opposing Nelson
8 in the congressional race.⁶ The Complaint argues that Nelson and the Nelson Committee
9 therefore violated 52 U.S.C. §§ 30104(b) and (g), and 30120, by failing to comply with the
10 disclaimer and reporting requirements for independent expenditures.⁷ The Complaint also
11 alleges that Nelson and his Committee coordinated the communication with the Clinton
12 Committee.⁸ The Complaint bases this allegation on the “content and timing of the
13 advertisement,” arguing that the advertisement benefitted Clinton because it appeared close to
14 the date of the election and attacked her opponent.⁹ If the communication was coordinated, the
15 Complaint argues, Nelson and the Nelson Committee made, and the Clinton Committee
16 accepted, unreported and excessive in-kind contributions, in violation of 52 U.S.C. §§ 30104(b)
17 and 30116(f).¹⁰

⁵ Nelson for Wisconsin, 2016 Post-General Report at 565, 567 (Dec. 8, 2016).

⁶ Compl. at 1-3.

⁷ *Id.* at 1, 3.

⁸ *Id.* at 1, 3-4.

⁹ *Id.* at 1.

¹⁰ *Id.* at 3.

1 Nelson and his Committee jointly respond that the advertisement did not constitute an
2 independent expenditure because it did not expressly advocate the defeat of Trump.¹¹ They
3 argue that the advertisement discussed Trump only to contrast Nelson's positions to those of
4 Trump, thereby encouraging people to vote for Nelson.¹² They state that the advertisement
5 supported "the election of *Nelson*, using Mike Gallagher's support of Trump as a reason to vote
6 against *Gallagher*."¹³ Nelson and his Committee also assert that in the past, the Commission has
7 declined to find reason to believe in what they describe as "circumstances just like these."¹⁴ As
8 to the disclaimer violation, they argue that the advertisement included the appropriate disclaimer
9 because it had a written statement identifying who paid for the message.¹⁵

10 Further, Nelson, the Nelson Committee, and the Clinton Committee each argue that the
11 Complaint's coordination allegations are insufficient as a matter of law.¹⁶ They note that the
12 proximity of the advertisement to the election and the fact that the advertisement mentioned
13 Trump do nothing to establish the "conduct" prong of the Commission's three-part test for
14 coordinated communications.¹⁷

15 III. LEGAL ANALYSIS

16 The Act defines "independent expenditure" as an expenditure "expressly advocating the
17 election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation

¹¹ Nelson & Nelson Comm. Resp. at 2-3.

¹² *Id.* at 3.

¹³ *Id.* (emphasis in original).

¹⁴ *Id.* (citing MUR 6113 (Hollingsworth) (3-3 vote)).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3-4; Clinton Comm. Resp. at 1-2 (Dec. 22, 2016).

¹⁷ Nelson & Nelson Comm. Resp. at 3; Clinton Comm. Resp. at 2.

1 with or at the request or suggestion of" a candidate, candidate's authorized committee, or either
2 of their agents.¹⁸ A coordinated expenditure, on the other hand, is an expenditure "made by any
3 person in cooperation, consultation, or concert, with, or at the request or suggestion of, a
4 candidate, his authorized political committees, or their agents."¹⁹ Therefore, the Complaint's
5 allegations that the "Real" advertisement was an independent expenditure *and* that it was likely
6 coordinated with the Clinton campaign are alternative theories, which are each addressed below.

7 **A. Coordination**

8 The available information does not provide a sufficient basis to find reason to believe that
9 the Nelson and Clinton campaigns coordinated the advertisement. A communication is
10 coordinated with a candidate, her authorized committee, or an agent of either, if it meets a three-
11 part test set forth in the Commission's regulations: (1) the communication is paid for, in whole or
12 in part, by a person other than the candidate or authorized committee; (2) the communication
13 satisfies one of the content standards at 11 C.F.R. § 109.21(c);²⁰ and (3) the communication

¹⁸ 52 U.S.C. § 30101(17); *see* 11 C.F.R. § 100.16; *see also id.* § 100.22 (defining "expressly advocating").

¹⁹ 52 U.S.C. § 30116(a)(7)(B)(i); *see* 11 C.F.R. § 109.20. A coordinated communication is treated as an in-kind contribution for purposes of the Act's contribution limits and reporting requirements. *See* 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.21(b).

²⁰ The content prong is satisfied if the communication is: (1) an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; (4) a public communication that, in relevant part, refers to a clearly identified presidential candidate, and is publicly distributed or disseminated in a jurisdiction 120 days or fewer before the candidate's primary election, up to and including the day of the general election; or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5).

1 satisfies one of the conduct standards at 11 C.F.R. § 109.21(d).²¹ All three prongs must be
2 satisfied for a communication to be considered coordinated under these regulations.²²

3 Here, however, the Complaint fails to allege specific facts related to any of the conduct
4 standards, and we do not have any information to support a conclusion that one may have been
5 met. The timing of the advertisement and the fact that it advocates against Clinton's opponent
6 are too speculative standing alone to establish conduct.²³ Accordingly, the Commission finds no
7 reason to believe that Nelson and the Nelson Committee made, and the Clinton Committee
8 accepted, excessive and unreported in-kind contributions, in violation of 52 U.S.C. §§ 30104(b)
9 and 30116(f) in connection with the advertisement.

10 **B. Independent Expenditures**

11 The Act requires committees to disclose disbursements for, and include disclaimers on,
12 their communications. While the Act includes specific reporting and disclaimer requirements for
13 independent expenditures,²⁴ it does not address independent expenditures by authorized
14 committees. When the Act discusses how committees are to disclose independent expenditures
15 on their periodic reports, it specifies that the instructions apply only to "political committee[s]
16 other than an authorized committee."²⁵

²¹ The types of conduct that satisfy the conduct prong include: (1) a request or suggestion; (2) material involvement; (3) a substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5).

²² *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

²³ *See* 11 C.F.R. § 109.21(d); Factual & Legal Analysis ("F&LA") at 10, MUR 7124 (Katie McGinty for Senate) (concluding that the timing of certain commercials paid for by third parties was not sufficient to support an inference that the third parties had any private communications with the candidate they supported); F&LA at 8, MUR 6821 (Shaheen for Senate) (stating that the "rough temporal proximity" of the two communications at issue did not "give rise to a reasonable inference that any of the conduct standards were satisfied").

²⁴ 52 U.S.C. §§ 30104(b)(4)(H)(iii), (g)(1)-(2), 30120(a); *see* 11 C.F.R. §§ 104.3(b)(1)(vii), 104.4(b)-(c), 110.11(a)-(c).

²⁵ 52 U.S.C. § 30104(b)(4)(H); *see* 11 C.F.R. § 104.3(b)(1)(vii).

1 Since the *Citizens United* decision,²⁶ the issue of whether authorized committees may
2 make independent expenditures for other candidates has arisen in at least one enforcement
3 matter.²⁷ However, the Commission did not affirmatively conclude in the enforcement matter
4 whether authorized committees may make independent expenditures under the Act and
5 Commission regulations.²⁸ Rather, the Commission has approved a notice of proposed
6 rulemaking to address the issue of authorized committees' independent spending.²⁹ Accordingly,
7 at this time, there is no specific Commission guidance on how spending made by a candidate to
8 support another candidate — assuming such expenditure would be permissible or be an
9 independent expenditure — should be reported.³⁰

10 Furthermore, there is no information in the record to suggest that the Nelson Committee
11 failed to report the costs of the advertisement in its regular disclosure reports. And though there
12 is insufficient information to conclusively track the costs of the advertisement to specific

²⁶ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁷ The Act provides that “[n]o political committee which supports or has supported more than one candidate may be designated as an authorized committee,” but specifies that “the term ‘support’ does not include a contribution by any authorized committee in amounts of \$2,000 or less to an authorized committee of any other candidate.” 52 U.S.C. § 30102(e)(3); *see* 11 C.F.R. § 102.12. In MUR 6405 (*Friends of John McCain, Inc.*), the Commission was faced with the question of whether 52 U.S.C. § 30102(e)(3) “prohibits an authorized committee of a federal candidate . . . from ‘supporting’ another federal candidate by paying for independent communications” that contain express advocacy. F&LA at 8-9, MUR 6405. The Commission, however, dismissed the section 30102(e)(3) allegation without reaching that question. *See id.* at 9-10. Instead, the Commission exercised its prosecutorial discretion, finding that it was “unlikely that independent spending by authorized committees would be deemed more potentially corrupting than independent expenditures by individuals, political parties, or corporations, each of which has been found [by the Supreme Court] to have a constitutional right to make unlimited independent expenditures.” *Id.* at 10.

²⁸ *See* F&LA, MUR 6405 at 9-10.

²⁹ *See* Independent Expenditures by Authorized Committees; Reporting Multistate Independent Expenditures and Electioneering Communications, 83 Fed. Reg. 3996 (Jan. 29, 2018).

³⁰ *See id.*; *see also supra* note 27.

1 reported disbursements, the 2016 Post-General Report does show disbursements for “media” on
2 the same date that the advertisement began airing.³¹

3 Accordingly, given these specific circumstances, and without determining whether the
4 “Real” advertisement includes express advocacy or is an independent expenditure, the
5 Commission dismisses as a matter of prosecutorial discretion the 52 U.S.C. § 30104(b) and (g)
6 reporting violations alleged against Nelson and the Nelson Committee.³²

7 For similar reasons, and without determining whether the “Real” advertisement contained
8 express advocacy or was an independent expenditure, we also dismiss the disclaimer allegation.
9 The Act requires any broadcast communication expressly advocating the election or defeat of a
10 clearly identified candidate to include a disclaimer, but the disclaimer requirements differ for
11 communications authorized by a candidate and those not authorized by “any candidate.”³³ The
12 “Real” advertisement here included a proper authorized disclaimer unambiguously stating that
13 Nelson paid for and approved the communication, and there was no suggestion in the
14 advertisement that any other candidate authorized the communication. Accordingly, the
15 Commission dismisses as a matter of prosecutorial discretion the allegation that Nelson and the
16 Nelson Committee violated 52 U.S.C. § 30120.³⁴

³¹ Nelson for Wisconsin, 2016 Post-General Report at 565, 567.

³² See *Heckler v. Chaney*, 470 U.S. 821 (1985).

³³ Compare 52 U.S.C. § 30120(a)(1) (setting out the disclaimer requirements for a communication authorized and paid for by a candidate), with *id.* § 30120(a)(3) (setting out the disclaimer requirements for a communication not authorized by “any candidate”).

³⁴ See *Heckler*, 470 U.S. 821; see also F&LA at 5-6, MUR 7039 (Bernie 2016) (dismissing a disclaimer violation when the communication included information sufficient to convey to the public who paid for and authorized the communication); F&LA at 7, MUR 7004 (The 2016 Committee) (same); F&LA at 4-5, MUR 6840 (All Citizens for Mississippi) (same); F&LA at 21-23, MUR 6438 (Art Robinson for Congress) (same).